SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

No. 187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR PETITIONER

CHARLES A. HOBBS,
Counsel for Petitioner
1616 H Street, N.W.
Washington 6. D.C.

WILKINSON, CRAGUN & BARKER
JOHN W. CRAGUN
ANGELO A. IADAROLA

FOLEY, SAMMOND & LARDNER
JAMES R. MODRALL, III
Of Counsel

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

AUTHORITIES CITED

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Claims is reprinted in the Appendix, pp. 5-26. It has not yet been reported in the Court of Claims reports, and apparently has not been selected for publication in the Federal reports. Two other decisions deal with this case, and they are reprinted in the Appendix, pp. 36 and 51. One is *State* v. *Sanapaw*, Shawano-Menominee County Court (1962) (unreported), and the other is same, Wisconsin Supreme Court, 21 Wis. 2d 377, 124 N.W.2d 41 (1963), *cert. den.* 377 U.S. 991, *reh. den.* 379 U.S. 871 (No. 930.O.T. 1963).

JURISDICTION

The judgment of the Court of Claims was entered April 14, 1967. The petition for certiorari was filed May 22, 1967, and was granted on October 9, 1967. Jurisdiction is invoked under 28 U.S.C. § 1255 (1).

TREATIES AND STATUTES INVOLVED

Treaty of May 12, 1854, 10 Stat. 1064, between the Menominee Tribe of Indians and the United States, Appendix pp. 31-32, and Menominee Termination Act of 1954, 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902, as made effective by Proclamation of the Secretary of Interior, April 29, 1961, 26 Fed.Reg. 3726, Appendix pp. 33-35.

QUESTION PRESENTED

Since aboriginal times the Menominee Indians have hunted and fished on their own land, free of state or federal regulation. This freedom was guaranteed by treaty in 1854. In 1954, Congress enacted the Menominee Termination Act, to terminate federal supervision and transfer general jurisdiction over the reservation to the State. Nothing was said in the Act about hunting and fishing rights. The question is whether this Act by implication abrogated the Indians' treaty hunting and fishing rights, by making them subject to state regulation.

STATEMENT

Introductory Statement

Prior to April 30, 1961, the Menominee Tribe of Indians of Wisconsin were under federal guardianship. They were provided certain benefits and services by the federal government, and were subject only to their own tribal laws and to such laws as Congress enacted appli-

cable to Indian reservations generally or to their reservation particularly. After April 30, 1961, federal guardianship was terminated, pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902. The Menominee Reservation became a county under the organic laws of the State of Wisconsin, and the Menominees became subject to the general laws of the State of Wisconsin.

Their title to their reservation derives from the Treaty of Wolf River (1854), 10 Stat. 1064, which confirmed their ownership of the land, and guaranteed them the right to hunt and fish on their land free of outside restrictions. This guarantee does not appear in so many words on the face of the Treaty, but as will be seen was imported into the Treaty by the surrounding circumstances.

After federal supervision was terminated, the State of Wisconsin took the position that the Indians' treaty rights to hunt and fish likewise were terminated. The State prosecuted several Menominees for violation of State game regulations. Although the trial judge ruled in the Indians' favor, the Wisconsin Supreme Court (by a two-to-one vote) reversed, holding that the Termination Act "abrogated" their treaty right to hunt and fish. This Court declined to review the case. These two decisions are reprinted in the Appendix, pp. 30 and 51.

Since this appeared to constitute a final determination that the Menominee hunting and fishing rights were lost, the Tribe filed suit in the Court of Claims seeking compensation for the loss. See petition, Appendix p. 1. That court refused to award compensation, on the ground that the hunting and fishing rights were *not* lost, but were still in force.

Thus the case came here.

The Tribe is in the anomalous position of petitioning this Court to *affirm* the Court of Claims below. The Tribe's hunting and fishing rights are more valuable to its members than would be any monetary compensation likely to be awarded, and so it would rather the Court of Claims be held correct than the Wisconsin Supreme Court.

We note that the State of Wisconsin intends to file a brief amicus curiae, "in support of the plaintiffs, the Menominee Tribe . . .." We assume the State means it will support the legal position that the Tribe necessarily had when it filed suit in the Court of Claims, i.e., that the Tribe had lost its rights. As stated above, the Tribe's position is that it still has its rights. The following sections give the facts of the case in detail.

Origin of the Hunting and Fishing Rights

Since time immemorial the Menominee Indians have lived as a tribe in the forests of Eastern Wisconsin. They constitute today a tribe of some 3,270 enrolled members.

By way of historical background, it may be noted that by the Treaty of St. Louis, 7 Stat. 153 (1817), the Menominee Indians acknowledged themselves to be under the protection of the United States, and the parties agreed there would be perpetual peace and friendship between them.[1] The Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundaries of the Menominees' territory. By the Treaty of Washington, 7 Stat. 342 (1831), as amended, 7 Stat. 405 (1832), they ceded some 3,000,000 acres of their aboriginal territory, and expressed a desire to remain under the "parental care and protection" of the

[1] The facts in this and the following paragraphs are based on the citations given and on the Court of Claims' findings, Appendix pp. 5-26.

United States. By the Treaty of Cedar Point, 7 Stat. 506 (1836), they ceded approximately 4,184,000 more acres.

By the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952 (1848), the Menominees ceded the balance of their lands in Wisconsin (estimated to contain about 4,000,000 acres),[2] in exchange for at least 600,000 acres west of the Mississippi. To give them time to explore their new lands, the Indians were to be permitted to remain on their ceded lands for two years, and thereafter until the President should notify them that the same were wanted.[3]

An exploration party of Menominees inspected the new lands, but reported that the lands were not suitable to the Tribe's needs. The Menominees refused to move to the new lands. They claimed that the understanding in 1848 had been that if the new lands were not acceptable they would be offered acceptable lands elsewhere.[4]

The Government extended the deadline for leaving, and suggested that they remove instead to a certain tract on Wolf River in Wisconsin, a little north of their then camping grounds. The proposed tract contained twelve townships, or 276,480 acres. The Menominees agreed and removed thither in the fall of 1852.[5]

The Government sought the permission of the State to the setting aside of the Wolf River reservation for the

---

[2] Annual Report of the Commissioner of Indian Affairs, 1848, Ex. Doc. 1, 30th Cong., 2d Sess., p. 397-8.

[3] Article 8.

[4] Annual Report of the Commissioner of Indian Affairs, 1851, H.R. Ex. Doc. 2, Part III, 32d Cong., 1st Sess., pp. 266-67, 293. See also recitations in the Treaty of Wolf River, 10 Stat. 1064 (1854), Appendix p. 31.

[5] Annual Report of the Commissioner of Indian Affairs, 1852, Sen. Doc. 1, 32d Cong., 2d Sess., pp. 295, 325. Congress appropriated $25,000 in 1852 to enable the Indians to move to the Wolf River Reservation. 10 Stat. 47.

Menominees, and on February 1, 1853, by joint resolution, the two houses of the Wisconsin legislature consented.[6]

We come now to the treaty involved in this case. In order to confirm the events of 1848-1853, the Tribe and the United States entered into the Treaty of Wolf River, 10 Stat. 1064 (1854), whereby the Menominees retroceded the undesirable lands they had acquired under the 1848 treaty, and the United States confirmed to them the substitute Wolf River Reservation, "for a home, to be held as Indian lands are held . . . ." Nothing was expressly said of hunting rights, but as the Court of Claims found on the evidence in another case,[7]

> "The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.
>
> ". . . part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty, was the fact that the tract in question contained swamp lands which were suitable for hunting."

In 1858 the Menominees ceded two of their twelve townships to the United States, for use of certain New

---

[6] 1853 Wis.Jt.Res., Chap. I, which states: "Resolved by the Senate and Assembly of the State of Wisconsin, That the assent of the State of Wisconsin is hereby given to the Menominee nation of Indians, to remain on the tract of land set apart for them by the President of the United States on the Wolf and Oconto rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows . . . .".

[7] *Menominee Tribe* v. *United States*, 95 Ct.Cl. 232, 240, 241 (1942). See also the Menominees' Treaty of 1831, 7 Stat. 342, Article Sixth, which reserved hunting and fishing rights on ceded land.

York Indians, 11 Stat. 679. The remainder, comprising about 230,000 acres, has remained their reservation to the present day. It has never been allotted, and with minor exceptions (such as public roads), remains today as in 1854 an intact tract of land, wholly owned by the Tribe.[8]

The Termination Act of 1954

In 1954, Congress enacted the Menominee Termination Act.[9] The purpose of the Act was "to provide for the orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." [10]

A comprehensive program was authorized to implement the Act and to insure that the transition was not detrimental to the Tribe. The Tribe was to propose a plan for administration of tribal property and affairs. It was contemplated that the Tribe would incorporate, the members would be stockholders, and the stockholders' powers would be exercised by a group of voting trustees. The Secretary of the Interior was authorized to transfer to the tribal corporation, on or before April 30, 1961, all tribal property held in trust by the United States.[11]

The Act provided that upon transfer of the property to the Tribe, the Secretary was to publish a proclamation of that fact and—[12]

> ". . . the laws of the several States shall apply to the tribe and its members in the same manner as

---

[8] The technical form of ownership since 1961 has been that the land is owned by the tribal corporation, and the Indians are the sole shareholders.

[9] 68 Stat. 250, 25 U.S.C. §§ 891-902, Appendix pp. 33-35.

[10] 25 U.S.C. § 891.

[11] 25 U.S.C. §§ 896, 897.

[12] 25 U.S.C. § 899.

they apply to other citizens or persons within their jurisdiction."

The Act was silent about preservation of hunting and fishing rights, although it did require that the Tribe's plan contain provisions for the protection of its fish and wildlife.[13]

The legislative history is of little help in determining whether Congress intended to destroy the Tribe's hunting and fishing rights, or whether Congress even considered the problem, although the problem was called to its attention, see discussion at pp. 22-23 below.

Pursuant to the Act, the Secretary's proclamation of termination was published on April 29, 1961, and the reservation was conveyed intact to the new tribal corporation.[14]

The story of what has happened to the Menominees since termination cannot be told here; suffice it to say that in 1966 a committee of Congress characterized them as "in desperate straits."[15] The hunting and fishing rights are more important to these Indians than ever.

History of Litigation

This suit has a rather long history of litigation. In 1962, the year following the Secretary's proclamation, the State took the position that the Menominees were fully

---

[13] 25 U.S.C. § 896.

[14] The proclamation appears at 26 Fed. Reg. 3726.

[15] H.Rept. 1924, 89th Cong. 2d Sess. (1966) at p. 2. The Termination Act was forced on the Menominees as a condition to releasing to them a large sum of money they had won in a suit against the United States. This and the ensuing suffering of these Indians are definitively documented by Gary A. Orfield, *A Study of Indian Termination Policy* (Master's thesis for the University of Chicago), published in 1966 by the National Congress of American Indians, Washington, D.C. See also remarks of Senator Proxmire, 111 Cong. Rec. 5922-5923 (1965), and Ridgeway, *The Lost Indians*, The New Republic, December 4, 1965. And see the Wisconsin trial court's comment, note 42 below.

subject to State hunting and fishing regulations.[16] It prosecuted three Menominee Indians for unlawfully hunting deer on the reservation with the aid of an artificial light and for unlawfully transporting a loaded and uncased gun in an automobile. The Indians argued that the 1854 treaty guaranteed the right to hunt on their reservation free of the white man's hunting rules, and that the Termination Act, being silent on the matter, did not abrogate these rights The trial court agreed, and dismissed the prosecution.[17]

The State appealed to the Wisconsin Supreme Court, which reversed, in a two-to-one decision.[18] All three judges agreed with the trial court that the tribe had special hunting rights under the 1854 treaty, but the majority held that the Termination Act abrogated those rights: [19]

> "It is our conclusion that the express provision of Sec. 899 of the Termination Act that 'the laws of

---

[16] A small sample of state hunting restrictions includes the following:

Hunting licenses are required, with fees ranging from $2 to $10. 4 West's Wisc. Stat. Ann. §§ 29.10, 29.105, 29.13, 29.132, 29.371. A "sportsman's" license can be bought for $6.50. Id. § 29.147.

Certain game can never be taken: for example quail, prairie chicken, turkey, mourning doves, plovers, badger, woodchuck, moose, elk, flying squirrel, white deer. Wisc. Admin. Code § WCD 10.01(2)(e), 10.03.

Permitted game may be taken only during certain seasons, and subject to daily bag limits. For example, partridges, up to three per day, may be taken between Oct. 19 and Nov. 24 only. Id. § WCD 10.01(2)(d). Squirrels, up to five per day, may be taken between Sept. 28 and Jan. 31. Id. § WCD 10.01(3)(a). Deer, one a day only, may be taken between Oct. 15 and Dec. 1. Id. § WCD 10.01(3)(e).

Prohibited methods includes, for example, night hunting, § WCD 10.06; use of nets or snares, § WCD 10.07(2); shooting birds with rifles, § WCD 10.07(5); hunting deer or bear in water, § WCD 10.10(2); use of bows of less than 30 lbs. pull, § WCD 10.11; hunting from a motorboat, § WCD 10.12(1)(a); tending traps at night, § WCD 10.13(3).

[17] The trial court's opinion in that case is reprinted in the Appendix, p. 36.

[18] Reprinted in the Appendix, p. 51.

[19] Appendix pp. 60-61.

> the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction,' includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation."

This Court refused to review that decision.[20]

On September 30, 1965, the Tribe filed a claim in the Court of Claims below, to recover just compensation for the loss of its hunting and fishing rights. On April 14, 1967, the Court by a vote of four-to-three dismissed the petition.[21] The majority, like the two Wisconsin courts, held that the Tribe had hunting and fishing rights under the Treaty of 1854, but contrary to the majority of the Wisconsin Supreme Court, held that these rights were *not* abrogated by the Termination Act of 1954. Accordingly, said the Court, the Tribe still owns the rights, and is not entitled to compensation.

The dissenters felt that the Indians should not be left in such a dilemma, and suggested as possible solutions (1) that this Court grant certiorari, or (2) that the Court of Claims accept the Wisconsin court's ruling in a spirit of comity (with final resolution left to "a higher court", i.e. this Court), or (3) that the question be certified to this Court under 28 U.S.C. § 1255(2). As to the merits, the dissenters favored the Tribe:

> "The Menominees are either entitled to their hunting and fishing rights under the Treaty or they are entitled to damages because these rights have been taken away . . . ."

On October 9, 1967, this Court granted certiorari.

---

[20] *Cert. den.*, 377 U.S. 991, *reh. den.* 379 U.S. 871; No. 930 O.T. 1963.

[21] Appendix p. 5.

SUMMARY OF ARGUMENT

I.

Indian hunting and fishing customs have a special status which has frequently been recognized by Congress, either in general statutes or as part of a bargain with a particular group of Indians. When so recognized, the customs assume the dignity of vested rights owned by the Indians. The essence of such rights, unless Congress guaranteed less, is the freedom from interference by white landowners and from regulation by white governments. In this case the right consists solely of the latter freedom, since the Indians already own the land where they wish to hunt and fish.

II.

The 1854 Treaty with the Menominees guaranteed the continuation of the Menominees' custom to hunt and fish free of state and federal regulation. This guarantee does not appear in so many words on the face of the Treaty, but was imported into the Treaty by the surrounding circumstances and by the language "to be held as Indian lands are held." Three courts—the Shawano-Menominee County Court, the Supreme Court of Wisconsin, and the U. S. Court of Claims below have so found. Two trial courts in Oregon—one state and the other federal—have so found in principle as to the Klamath Indians under indistinguishable circumstances.

III.

The Menominee Termination Act did not abrogate the Tribe's hunting and fishing rights. The purpose of the Act was to terminate federal supervision, not to extinguish treaty rights. Another purpose of the Act was to transfer to the State general criminal and civil jurisdiction over the reservation, but this purpose did not by

implication require extinguishing the Indians' hunting and fishing rights by subjecting them to state regulation, and in any event the transfer of jurisdiction had already been effected under another statute, Public Law 280, which expressly preserved the Indians' hunting and fishing rights.

IV.

If, contrary to our assertion and the decision of the Court of Claims below, the Termination Act did extinguish the Indians' hunting and fishing rights, then the Indians are entitled to just compensation for the loss of these valuable rights.

ARGUMENT

I. It Has Traditionally Been Recognized That Indian Hunting and Fishing Customs Have a Special Status

Since earliest times the United States has recognized the special status of Indian hunting and fishing customs. One of the earliest examples was the Seneca "Contract" of 1797,[22] in reality a treaty,[23] whereby the Indians sold land, "excepting and reserving to them . . . the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."[24]

Even when treating with foreign countries or in enacting general statutes Congress has often demonstrated regard for the special status of Indian hunting and fishing

---

[22] 7 Stat. 601.

[23] It was ratified by the Senate and proclaimed by the President. See *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 561 (1916).

[24] For citations to other examples, see Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo.Wash.L.Rev. 504, 512-513 (1964). This article was finished and accepted for publication in June, 1963, before Mr. Hobbs was aware that his firm would be retained in the instant case. Retention was in December, 1963. The article was updated and published in April, 1964.

customs. For example, see the Migratory Bird Treaty between the United States and Great Britain, which lays down certain restrictions, but makes certain exceptions for Indians hunting for their own use.[25] See also the Fur Seal Agreement between the United States and Canada, and other international treaties and conventions,[26] and various acts of Congress.[27] See Public Law 280, which transferred civil and criminal jurisdiction over certain Indian reservations to the appropriate States, but expressly preserved hunting and fishing rights from state regulation.[28] As we shall see, Public Law 280 has a special relevance to this case.

Even *off*-reservation rights, which this Court has said are subject to certain state regulations,[29] have certain exemptions from state regulation. For example, the Indians do not need to buy licenses,[30] and they are subject only to such fish and game regulations as the state can prove are actually "indispensable" to conservation, by which is meant that the state must first restrict white fishing and hunting, and only if that is not enough may it then restrict Indian fishing or hunting.[31]

---

[25] Art. II, 39 Stat. 1702 (1916).

[26] Sec. 3, 58 Stat. 100 (1944). For other similar treaties and conventions, see Art. VIII, 28 Stat. 52 (1894); Sec. 1, 32 Stat. 327 (1902); Art. I, 37 Stat. 1538 (1911); Sec. 3, 37 Stat. 499 (1912).

[27] For acts of Congress restricting hunting or fishing but making an exception for Indians hunting for their own use, see Sec. 1, 16 Stat. 180 (1870); Sec. 6, 30 Stat. 226 (1897); Sec. 177, 30 Stat. 1253, 1280 (1899); Sec. 1, 35 Stat. 102 (1908); Sec. 6, 36 Stat. 326 (1910); and 16 U.S.C. § 631c.

[28] 67 Stat. 588 (1953), 18 U.S.C. § 1162.

[29] *Tulee* v. *Washington*, 315 U.S. 681 (1942).

[30] Id; also *State* v. *McConville*, 65 Ida. 46, 139 P.2d 485 (1943).

[31] This might be called the "federal rule." It is the holding of *Makah Tribe* v. *Schoettler*, 192 F.2d 224 (9th Cir. 1951); *Maison*

[Footnote continued on page 14]

As the cases show, the Indians typically hunt and fish for subsistence, not for sport or commercial gain, and their take is usually a small fraction of that taken by white sportsmen and commercial operators.[32]

Indian hunting and fishing rights are superior to the hunting and fishing rights of an ordinary landowner. For example, an ordinary landowner may not exclude the public from hunting and fishing on navigable waters within his boundaries,[33] but an Indian tribe may do so.[34]

Indian hunting and fishing rights are property. This property may be conceptualized in several ways. One, and in our view a rather unhelpful concept, is in terms of

---

[31] [Continued]

v. *Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), *cert. den.*, 375 U.S. 829, affirming 186 F. Supp. 519 (D. Ore. 1960); and *Holcomb* v. *Confederated Tribes* v. *Maison*, —— F.2d —— (9th Cir., Sep. 19, 1967, not yet reported), affirming 262 F.Supp. 871 (D. Ore. 1966).

There are two other rules. The "Idaho rule" is even more favorable to the Indians—it holds that off-reservation treaty hunting rights are not subject to state regulation at all. *State* v. *Arthur*, 74 Ida. 251, 261 P.2d 135 (1953); *cert. den.*, 347 U.S. 937. Canada seems to follow the Idaho rule. *Regina* v. *White*, 50 D.L.R. 2d 613 (Brit. Col.Ct. App. 1964), *aff'd* 52 D.L.R. 2d 481 (Sup.Ct.Can. 1965). A third rule, the "Washington rule," is less favorable to the Indians; it holds that the Indians must obey "reasonable and necessary" fishing regulations. *Dept. of Game* v. *Puyallup Tribe*, 422 P.2d 754 (Wash. 1967), cert. applied for, No. 247, O.T. 1967.

[32] See, e.g., *Confederated Tribes* v. *Maison*, 262 F.Supp. 871, 872 (D. Ore. 1966), noting that the Indians annually took 150 to 175 elk and 300 to 350 deer, for subsistence, while sportsmen took 9,055 elk and 24,222 deer. See also *Confederated Tribes* v. *Maison*, 186 F.Supp. 519, 520 (D. Ore. 1960) with respect to fish. And see *Maison* v. *Confederated Tribes*, 314 F.2d 169, 173 (9th Cir. 1963), where an expert witness for the state admitted that "conservation" to the state meant protecting the resource for the benefit of commercial and sports fishermen, without regard to Indian welfare.

[33] See, e.g., *Swan Island Club Inc.* v. *Yarbrough*, 209 F.2d 698 (4th Cir. 1954); *Diana Shooting Club* v. *Husting*, 156 Wis. 261, 145 N.W. 816 (1914).

[34] *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78 (1918); *Metlakatla Indians* v. *Egan*, 369 U.S. 45 (1962).

title to the fish and game within the reservation.[35] See, for example, *Mason* v. *Sams*, where the court regarded the fish in reservation waters as belonging to the tribe:[36]

> "The state owns the fish and the game of the state, and may regulate or license the right to take them, or forbid it entirely. But the fish in the waters of this stream do not belong to the state, nor to the United States; but to the Indians of this reservation."

Another and more realistic concept is that the right consists of an immunity from outside interference. With respect to interference from private landowners, the *Winans* and *Seufert* cases[37] are illustrative; these cases recognized an easement on non-Indian land in favor of the Indians. They involved off-reservation rights, unlike here, where the rights claimed are entirely within the reservation.

This case involves not immunity from private landowners, but immunity from interference by outside governments, and specifically, the government of the State of Wisconsin. If these Indians' hunting and fishing rights have become subject to State regulation, they are now valueless, because the *only* valuable incident of the rights

---

[35] Under general non-Indian law it has frequently been said, see e.g., *Geer* v. *Connecticut*, 161 U.S. 519 (1896), that the state owns the game within its borders, in trust for its people. By analogy, the same can be said of a tribe's interest in game within the reservation. But as this Court has said, *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948), this concept of ownership is now regarded as a fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." See also *Sickman* v. *United States*, 184 F.2d 616 (7th Cir. 1950), *cert. den.*, 341 U.S. 939 (U.S. does not own the migratory waterfowl within its boundaries).

[36] 5 F.2d 255, 258 (W.D. Wash. 1925).

[37] *United States* v. *Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919).

is their immunity from State regulation. All other incidents are already owned by the Indians without reference to the treaty rights, because they are the landowners.

In sum, Indian hunting and fishing customs have a special status which has frequently been recognized by Congress, either in general statutes or as part of a bargain with a particular group of Indians. The essence of the right, unless Congress guaranteed less, is the freedom from interference by white landowners and from regulation by white governments. In this case the sole value of the right is the latter, since the Indians themselves own the land.

II. The Menominee Tribe Had a Treaty Right to Hunt and Fish on Its Reservation Free of any State or Federal Restrictions

Under Article 2 of the 1854 Treaty[38] the United States set aside for the Menominee Tribe a certain tract of land (reservation) and agreed that it would "be held as Indian lands are held." This language, in light of the background of this Treaty and the traditions of these Indians, constitutes an implied guarantee of the Indians' right to hunt and fish. We assume it goes without saying that an implied treaty right, once proven, is no different than an express treaty right.

The Wisconsin trial court in the first proceeding found the right existed:[39]

> "It appears to this court without even the slightest of doubt, first, that the title to the Reservation originally vested in the Indians and that the essence without even a serious doubt of the treaty entered into contemplated and intended that even if the lands were

---

[38] 10 Stat. 1064, 1065; Appendix p. 32.

[39] *State* v. *Sanapaw*, Shawano-Menominee County Court (1962), Appendix at p. 43.

> granted to the government the government returned them with the incident of hunting and fishing included. Any other view of what transpired is inconsistent with all the factual bargaining and understanding between the parties. It was definitely understood that the Indians were to receive the right and title in the same absolute position as they originally held it. Their way of life, hunting, fishing and limited tilling of the soil, was the entire essence of the treaty, the government guaranteeing this."

So did the Wisconsin Supreme Court in the second proceeding: [40]

> "It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them 'to be held as Indian lands are held.' Construing this ambiguous provision of the 1854 Treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty."

So did the Court of Claims in the third proceeding, the proceeding below: [41]

> "The Menominees say that the language 'to be held as Indian lands are held' grants them an unqualified right to hunt and fish on the reservation in their own way free from all outside regulation or control. We think they are right, *Cf. Oneida Tribe* v. *United*

[40] *State* v. *Sanapaw*, 124 N.W.2d 41, 44 (1963); Appendix at pp. 55-56. See also dissenting opinion, Appendix at p. 62.

[41] Appendix at p. 10.

States, 165 Ct. Cl. 437, 490-91 (1964), *cert. denied*, 379 U.S. 946. *Moore* v. *United States*, 157 F. 2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827. The primary reason they accepted this reservation as their new home was that it was filled with all kinds of game. We so held in the case of *Menominee Tribe of Indians* v. *United States*, 95 Ct. Cl. 232, 240-41 (1941), where we said:

> 'The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game. * * *
>
> '* * * part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty was the fact that the tract in question contained swamp lands which were suitable for hunting.'

"It should be remembered that at the time of the treaty in 1854, hunting and fishing was a way of life with the Menominees. They depended on it for their livelihood if not their very existence."

We might add that the Menominees still do depend on hunting and fishing to supplement their diet.[42]

---

[42] See notes 15 and 32 above, and see the commentary of the Wisconsin trial court, Appendix pp. 47-48 (see also the dissent in the Wisconsin Supreme Court, Appendix p. 61):

> "Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by theft and pawning. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help.
>
> "The right of hunting and fishing is more important and vital to the Menominee than the right of all of Wisconsin or United States citizens to invade it."

The Klamath Tribe has a treaty [43] which for present purposes is indistinguishable from the Menominee Treaty, and two courts have construed it the same as the three courts mentioned have construed the Menominee Treaty. The Klamath Treaty, like the Menominee Treaty, is silent on hunting rights.[44] Yet in 1956, the U. S. District Court for the District of Oregon held that the Klamath Treaty guaranteed the right "to hunt and trap upon the Klamath Indian Reservation without restriction or control, except such restriction or control as they may impose upon themselves." [45] And in 1961, the Klamath County District Court held likewise.[46]

The Klamath cases are unusually strong precedents because the Klamath Treaty, while silent as to *hunting* rights, expressly guaranteed *fishing* rights. Under the

---

[43] 16 Stat. 707 (1864).

[44] Article I expressly guarantees fishing rights, but not hunting rights. 16 Stat. at 708.

[45] *Klamath & Modoc Tribes* v. *Maison*, 139 F.Supp. 634 (D. Ore. 1956). This case was brought to determine whether the Klamaths had any hunting rights protectible under Public Law 280, 67 Stat. 588, 18 U.S.C. § 1162. Although the Klamath Termination Act, 25 U.S.C. § 564 (1954) had been approved when that case was brought it had not yet become effective, so that state jurisdiction over the Klamath Reservation was solely pursuant to Public Law 280 at that time. Cf. discussion at pp. 24-25 below. Later, in 1963, after the Klamath Termination Act became effective, the court again considered the question, and found that the Klamaths' hunting rights were not subject to state regulation under the Termination Act either. Civil No. 8081 (unreported), referred to by the Court of Claims, Appendix pp. 19-21, and reprinted in the appendix to the petition for certiorari, p. 74. The decision was appealed to the Ninth Circuit on other grounds, and the above cited holding was not disturbed or questioned. 338 F.2d 620 (1964).

[46] *State* v. *Pearson* (unreported); referred to by the Court of Claims, Appendix pp. 19-21, and reprinted in the appendix to the petition for certiorari, p. 70. This case, like the second phase of the Klamath case in the U.S. District Court, see note 45 above, involved the question whether the Termination Act abrogated the hunting rights.

principle that to name one is to exclude others, the courts could have found that the treaty had affirmatively intended not to protect the unmentioned hunting customs.

The Bureau of Indian Affairs has accepted the principle expressed in the Klamath and Menominee holdings, that these tribes have treaty hunting rights. A Memorandum from Commissioner of Indian Affairs Emmons to the Area Directors, July 2, 1956, states:[47]

> "It thus appears, from the only judicial interpretation of the act which has been made [the *Klamath* case, note 45 above], that the intention of Congress was to preserve and protect both express and implied rights, privileges and immunities afforded under Federal treaties, agreements, or statutes with respects to hunting, trapping and fishing. This Bureau will accept the interpretation of the statute as made by the courts and lend such assistance as is possible in preserving and protecting hunting and fishing rights of the Indians."

In short, three courts have held, and two others have agreed in principle, and the Bureau of Indian Affairs accepts the principle, that the 1854 Treaty guaranteed the Menominees' right to hunt and fish free of outside regulation.

III. The Menominee Termination Act Did Not Abrogate the Tribe's Hunting and Fishing Rights

The Court below found that the Menominee Termination Act did not abrogate the Tribe's hunting and fishing rights. We think this is clearly correct, and it is in accord with the finding of the Wisconsin trial court, the dissent

---

[47] Referred to and quoted by the Court of Claims, Appendix pp. 21-23, and reprinted in full in the appendix to the first petition for certiorari, No. 930, O.T. 1963, sub.nom. *Sanapaw* v. *Wisconsin*, at p. 51.

in the Wisconsin Supreme Court, and the two Klamath decisions, notes 45 and 46 above.[47a]

In 1954 Congress enacted the Menominee Termination Act.[48] The purpose of the Act, as recited in its first section, was "to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." The Act did not purport to extinguish any hunting and fishing rights or any other treaty right.

Ordinarily, silence in such a statute would not be interpreted to extinguish Indian treaty rights.[49] But the Wisconsin Supreme Court held that certain other language in the Termination Act had the effect of abrogating the hunting and fishing rights. That was the language transferring civil and criminal jurisdiction over the Menominees to the state government: [50]

> ". . . all statutes of the United States which affect Indians because of their status as Indians shall no

---

[47a] And is in accord with a memorandum prepared for Congressman Melvin A. Laird, May 22, 1958, by the Legislative Reference Service of the Library of Congress: "The Menominee Tribe and its members would retain exclusive fishing and hunting rights in the reservation streams and forests as long as they continued to live on the reservation and as long as they remained members of the tribe . . . ."

[48] 68 Stat. 250, as amended, 25 U.S.C. §§ 891-902; Appendix p. 33.

[49] See *Squire* v. *Capoeman*, 351 U.S. 1 (1956), which held that the federal income tax statute, though silent as to any exemption for Indian allotments, did not abrogate the Indians' implied right to be free of income tax on their allotments. See also *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27-28, (1886); *Jones* v. *Meeham*, 175 U.S. 1, 11 (1899); *United States* v. *Winans*, 198 U.S. 371, 380 (1905); *Winters* v. *United States*, 207 U.S. 564, 576 (1908); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198 (1919); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930), Dept. of the Interior, *Federal Indian Law*, 499 (1958).

[50] 25 U.S.C. § 899; Appendix p. 35.

longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."

Does this mean that the Wisconsin fish and game regulations now apply to Menominee hunting and fishing activities? If so, the Tribe has totally lost its hunting and fishing rights, for their only valuable incident was their immunity from outside regulation.

The legislative history is not conclusive. Two bills—S.2813 and H.R. 7135 [51]—which would have expressly preserved any treaty hunting and fishing rights were supported by the Tribe but were not enacted. The bill which became law was H.R. 2828, which, as stated, was silent on hunting and fishing rights, but two spokesmen for the Department of the Interior agreed that it did not affect treaty rights.

Assistant Secretary of the Interior Orme Lewis advised the Committees that: [52]

> "H. R. 2828 contains no provision on this subject. *It does not purport to affect any treaty rights the Indians may have.* If any special hunting and fishing rights have been granted by statute, however, they will be repealed by the provision of the bill making inapplicable all statutes that apply to Indians merely because of their status as Indians." (Emphasis added.)

Mr. Lewis Sigler, Program Counsel of the Bureau of Indian Affairs, testified: [53]

---

[51] 83rd Cong.

[52] Joint Hearings on H.R. 2828 Before Subcommittees of the Senate and House Interior and Insular Affairs Committees, 83rd Cong. 2d Sess. (March 10, 11, 12, 1954) (Serial 11001) at p. 588.

[53] Id. at p. 629.

"The next difference relates to hunting and fishing rights. The earlier bill [H. R. 2828] does not say anything at all about the subject. It is silent. *And by its silence it, in my judgment, makes no change in any treaty rights that may exist.* However, the earlier bill will repeal any hunting and fishing rights that may have been granted by statute. I do not know of any such rights, but there is the general provision in the bill making inapplicable to these Indians Federal legislation that applies to Indians as such, which would affect any special statute that may be on the books. Again, I do not know of any such statute. *It would not, however, in my judgment, affect the treaty rights, which are not specifically mentioned but are not in conflict with this particular bill.*" (Emphasis added.)

These government officials were well aware of the Menominees' claimed treaty rights, and were saying that if the treaty rights did exist, they were not affected by the bill.

The attorney for the Tribe, Glen A. Wilkinson, attempting to persuade the Committee to adopt S.2813 and H.R. 7135 instead of H.R. 2828, spoke against the latter bill by arguing that its silence would, by implication, abolish the Tribe's rights.[54]

There is no indication as to what views, if any, the Committee members had as to the effect of H.R. 2828 on the Menominees' hunting and fishing rights. Entirely conceivably, they may have decided to leave the matter up to the judiciary. They knew that hunting and fishing rights had been asserted by the Tribe. It would have been inappropriate from any standpoint for the Congress to declare its opinion as to whether the Tribe was correct, and most presumptuous and inequitable to have expressly declared the abolition of any such rights as might exist. It ought not to be presumed that Congress intended to

---

[54] Id. at 697.

achieve by silence what would have been so inappropriate to declare expressly.

This reasoning is reinforced very strongly by the fact that the State initially assumed jurisdiction over the Menominee Reservation under Public Law 280, not the Termination Act, and Public Law 280 *expressly preserved any treaty hunting and fishing rights the Menominees had.* Public Law 280 states: [55]

> "Nothing in this section . . . shall deprive any . . . Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Public Law 280 is a federal statute enacted in 1953, which transferred to certain states civil and criminal jurisdiction over certain Indian reservations.[56] On August 24, 1954, it was amended at the Tribe's request to include the Menominee Reservation among the reservations affected.[57] The Menominee Termination Act did not become effective until April 30, 1961,[58] so that from August 24, 1954, until April 30, 1961, the basis for the State's jurisdiction over the Menominee Reservation was Public Law 280, which as quoted above expressly exempted the Menominees' hunting and fishing rights from state regulation.

Beginning April 30, 1961, the basis for the State's jurisdiction over the Menominee Reservation probably shifted to the Menominee Termination Act, but this jurisdiction under the Termination Act was regarded as incorpo-

---

[55] 18 U.S.C. § 1162(b).

[56] 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360.

[57] 68 Stat. 795; S.Rept. 2223, 83d Cong. 2d Sess. (1954).

[58] See Proclamation of Secretary of the Interior, 26 Fed. Reg. 3726.

rating the terms of Public Law 280: the Termination Act required that the Tribe prepare a Termination Plan including provisions for law and order and for protection of fish and wildlife.[59] The Plan eventually approved and proclaimed by the Secretary recited that it was unnecessary—[60]

> "... to provide specific plans for future handling of law and order [which, as the Court of Claims said, Appendix p. 16, would include hunting and fishing], federal jurisdiction over the Menominee Reservation having been surrendered by the United States by Public Law 280, 83d Congress, as amended (18 U.S.C. 1162)."

Thus, as the Court of Claims found, the Termination Act, instead of abrogating the Tribe's hunting and fishing rights, actually preserved and protected them.

It is perhaps unnecessary to note that the Tribe's immunity from outside regulation of hunting and fishing was inherent in and was the gist of its hunting and fishing rights. The immunity did not exist merely because (prior to termination) the state lacked general jurisdiction over the Indians on their reservation. If the immunity was based on mere lack of state jurisdiction generally, the Menominees (and Klamaths) have lost that immunity, because the state now does have general jurisdiction over the reservation. Congress obviously intended by the Termination Act to give the state police power over ordinary Menominee activities, and if hunting is merely another ordinary and unprotected Menominee activity, like driving, marrying, etc., then the state now has jurisdiction over Menominee hunting and fishing.

---

[59] 25 U.S.C. § 896, Appendix p. 34.

[60] 26 Fed. Reg. 3726, 3728 (1961), quoted by the Court of Claims below, Appendix pp. 16-17.

But this theory is not correct, and none of the five courts which has considered the problem has ever accepted it. The Court of Claims and the Wisconsin trial court obviously rejected this theory when they held that the immunity still exists today, even though Wisconsin now does have general jurisdiction over the Menominee Reservation. Even the Wisconsin Supreme Court, which held that the immunity did not exist, did so on the basis that the immunity was "abrogated" by Congress when the Menominee Termination Act became effective, and not on the basis that there never was any inherent immunity.[61]

The two courts in Oregon obviously rejected this theory when they held that the immunity still exists today, even though Oregon now has general jurisdiction over the Klamath Reservation.[62]

The immunity, by the way, as the Court of Claims, the Wisconsin trial court and the two Klamath courts indicated, includes immunity from *all* outside regulation, state and federal. In *United States* v. *Cutler*,[63] the United States claimed that the Shoshone Indians were subject to the hunting restrictions set forth in the Migratory Bird Treaty. The court rejected this. In *Mason* v. *Sams*,[64] the Secretary of the Interior tried to impose regulations on Quinault Indian fishing activities, but the court struck them down. It is not a question merely of transferring federal police power to the state, but of an absence of police power altogether, federal or state, over Indian hunting and fishing on the reservation. Of course, Congress has constitutional *power* to regulate Indian hunt-

---

[61] See above, p. 10.

[62] See above, notes 45 and 46.

[63] 37 F.Supp. 724 (D. Ida. 1941).

[64] 5 F.2d 255 (W.D. Wash. 1925).

ing and fishing,[65] but just compensation would lie if the exercise of this power should extinguish the hunting and fishing rights guaranteed by treaty.[66]

IV. If the Menominee Termination Act Did Abrogate the Tribe's Hunting and Fishing Rights, Then the Tribe Is Entitled to Just Compensation

We have shown that the Tribe's hunting and fishing rights were guaranteed by treaty, that they are valuable property rights, and that their only vaulable incident is their freedom from outside governmental regulation. Consequently, if contrary to our argument in Point III they are now subject to state regulation, then they have been extinguished and just compensation lies.

The United States has always recognized that Indian hunting and fishing rights are valuable tribal assets. For example, see the Fort Laramie Treaty,[67] whereby the United States promised to pay the Indians for damages resulting from white activities authorized by the treaty. The minutes of the treaty negotiations state:[68]

> "The ears of your Great Father are always open to the complaints of his Red Children. He has heard and is aware that your buffalo and game are driven off, and your grass and timber consumed by the opening of roads and the passing of emigrants through your countries. For these losses he desires to compensate you. He does not desire that his White Children shall drive off the Buffalo and destroy your

---

[65] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); Department of the Interior, *Federal Indian Law* 499 (1958).

[66] *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937). There are no incidents of the hunting right in this case beyond the immunity from restrictions. Cancellation of the immunity, therefore, would extinguish the hunting right.

[67] 11 Stat. 749 (1851).

[68] The St. Louis Republican, October 26, 1851.

hunting-grounds, without making you just restitution."

There is even precedent for the payment for compensation for the loss of the right to hunt free of state regulation. The Shoshones had an off-reservation hunting right pursuant to the Fort Bridger treaty. In 1896 this Court held that the exercise of the right was subject to state hunting regulations outside the reservation.[69] Following the decision, Congress paid the tribe $75,000 as "reparation" for the loss.[70] This of course was not a judicial finding that just compensation lay, but at least reflects a feeling by Congress that a payment was due.

In 1864, Congress authorized the President to negotiate with the Confederated Tribes of Middle Oregon for a relinguishment of their off-reservation hunting and fishing rights, and appropriated $5,000 to pay for such rights.[71]

Consider the *Celilo Falls* case.[72] In that case the construction of a dam on the Columbia River at The Dalles inundated a number of Indian fishing locations. These locations were desirable because the rocks were like stepping stones extending out into the river, channeling the water and enabling fishermen easily to spear or net the

---

[69] *Ward* v. *Race Horse*, 163 U.S. 504.

[70] S. Rept. 69, 56th Cong. 1st Sess. 2 (1900):

"The price agreed [for a cession of land] was $525,000, or about $1.25 per acre, to which was added $75,000 as a reparation for the right to hunt in Wyoming, which was given them [Indians] by the Fort Bridger treaty and of which they were deprived by the decision of the United States Supreme Court, May 25, 1896."

[71] 13 Stat. 324. See also 54 Stat. 703 (1940) and 43 Stat. 117 (1924), specifically reserving certain hunting and fishing rights in new reservoirs in lieu of previous rights.

[72] Many of the facts appear in *Whitefoot* v. *United States*, 155 Ct.Cl. 127, 293 F.2d 658 (1961), *cert. den.*, 369 U.S. 818.

passing fish. After protests from the Indians the Corps of Engineers of the U.S. Army negotiated a settlement with the tribes involved, primarily the Yakimas, in the amount of almost $27,000,000, which Congress approved and paid.

It is interesting to note that the Celilo payment was not for loss of fish, because the dam did not block the passage of fish (the Indians are still fishing today near their old locations), but for loss of advantageous fishing sites. Similarly, the Menominee Reservation is still inhabited by fish and game, but if the Wisconsin Supreme Court is right, they have lost the right to catch them whenever and by whatever methods the Tribe may decide are permissible.

In a claim brought under a special jurisdictional act, the Tlingit Indians have been held entitled to compensation for the fact that white men appropriated the Indian fisheries and frightened game away.[73] The Court of Claims said in that case:[74]

> "The most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others."

The Court of Claims below said in this case that "The right to hunt and fish Indian fashion is a valuable property right."[75]

Several non-Indian cases recognize that diminution of the freedom to hunt or fish may constitute a taking calling for just compensation. In *Allen* v. *McClellan*,[76] the New Mexico Game Commission established a game ref-

---

[73] *Tlingit and Haida Indians* v. *United States*, 147 Ct.Cl. 315, 177 F.Supp. 452 (1959).

[74] 177 F.Supp. at 468.

[75] Appendix p. 12.

[76] 75 N.M. 400, 405 P.2d 405 (1965).

uge, and the landowner's land happened to be in the middle of it. The commission forbade him to hunt on his land. The court held that the commission had no power to do this without paying just compensation:

> "It is our view that the commission may not create a game refuge or migratory bird resting ground on private land without consent, or without acquiring the necessary interest in the land by eminent domain or in such other manner as is authorized by the law.
>
> "It is also our view that the inclusion of private land within such a game management area for the purpose of providing a place for migratory birds 'to rest and feed unmolested' may result in consequential damage to the owner of private land included therein . . . ."

In *Alford* v. *Finch*,[77] the same thing happened in Florida, with the same judicial reaction:

> "The predominant feature in the instant case is the taking, with neither consent nor compensation, by appellant from the appellees, of a property right—the right to pursue the game on their land. It is our view that the Commission is empowered to regulate the taking of game and to acquire property, by purchase and gift, for its use but that under the authority delineated in the constitution, it is not, under the guise of regulation or otherwise, empowered to take private property for public purpose without just compensation."

A case decided by the Court of Claims is relevant on the issue of just compensation for the diminution of hunting and fishing rights. In *Todd* v. *United States*,[78] claims by private citizens were made for just compensation for

---

[77] 155 So. 2d 790 (Fla. 1963).

[78] 155 Ct.Cl. 87 (1961). See also, companion case, *Todd* v. *United States*, 155 Ct.Cl. 111 (1961), and similar case, *Jackson* v. *United States*, 122 Ct.Cl. 197 (1952).

loss of fishing rights. Plaintiffs had licenses from the State of Maryland to fish in certain locations in Chesapeake Bay. In 1943, the Secretary of War issued danger zone regulations, which imposed onerous restrictions on plaintiffs' exercise of their fishing rights. The Court of Claims held that there was a taking, and that the right to fish granted to plaintiffs by state license constituted a property right, the loss of which was compensable under the Fifth Amendment to the Constitution. The Court went on to state that:[79]

> "The consequences of defendant's taking of plaintiffs' property rights granted by those licenses cannot be avoided by granting to plaintiffs permission to make limited use of those rights under conditions which proved altogether worthless."

The *Todd* plaintiffs had a vested fishing right. It was not an absolute right, but was subject to the usual state fishing regulations and to certain restrictions imposed by the state when the right was granted.[80] It was not even a permanent right, but was subject to application for annual renewal. However, when the United States imposed additional restrictions on the right, even though in aid of the prosecution of the war, a public purpose, just compensation was due. Here, the Menominees had an unrestricted and permanent right to hunt and fish within the boundaries of their reservation guaranteed by treaty. If their right is now subject to state restrictions, they are at least as entitled to compensation as the *Todd* plaintiffs.

---

[79] 155 Ct.Cl. at 97.

[80] The state restrictions are set forth in 155 Ct.Cl. at 101-102.

CONCLUSION

The Treaty of 1854 guaranteed the right of the Menominee Tribe to hunt and fish free of outside interference. Congress did not intend the extinction of this right when it enacted the Menominee Termination Act. Consequently, the Menominee Indians are free today to hunt and fish within the boundaries of their reservation without regard to state fish and game regulations. But if the right was extinguished, then the Menominees are entitled to just compensation for the loss of such right.

Respectfully submitted,

CHARLES A. HOBBS,
Counsel for Petitioner

WILKINSON, CRAGUN & BARKER
JOHN W. CRAGUN
ANGELO A. IADAROLA

FOLEY, SAMMOND & LARDNER
JAMES R. MODRALL, III
Of Counsel

November 24, 1967